Protemp Exhibitions Sdn Bhd v Ng Lai Teck & Ors (sued as office bearer for Persatuan Peniaga-Peniaga Perabut Muar, Johor) & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S1–22–521 OF 2001
KANG HWEE GEE J
30 JUNE 2006

Contract — Breach — Termination — Whether termination was wrongful — Termination due to unsatisfactory performance of plaintiff as exhibition manager — Whether assessment of plaintiff's performance must be subjective

Pursuant to an agreement dated 7 January 1999 ('the appointment agreement'), the first and second defendants as joint organisers appointed the plaintiff as the exhibition manager of the Malaysia Furniture Export Exhibition 1999 ('MAFEX '99'). Clause 3 of the agreement stated that the defendants agreed to re-appoint the plaintiff as exhibition manager for the next three succeeding exhibitions 'based upon satisfactory performance of [the plaintiff] in managing and staging the exhibition.' Upon the successful management and staging of MAFEX '99 and MAFEX 2000, the first and second defendants terminated the appointment agreement and the plaintiff's appointment as exhibition manager for MAFEX 2001 and MAFEX 2002. In this action, the plaintiff claimed that the termination was in breach of the provisions of the appointment agreement and did not comply with the termination procedure in the agreement.

The defendants' defence was two fold: (1) the plaintiff's performance was unsatisfactory and therefore the defendants were entitled not to reappoint the plaintiff for the subsequent years 2001 and 2002; and (2) the claim of the plaintiff in any case had been settled by a settlement between the plaintiff and the defendants.

Held, dismissing the plaintiff's claim:

(1) The settlement agreement did not say whether the settlement included a settlement not to reemploy the plaintiff for the year 2001 and 2002. It could not therefore be read as a defence to the plaintiff's claim to be employed for the subsequent years (see para 5).

(2) Clause 3 of the agreement conferred upon the defendants the right to assess the plaintiff's performance on a subjective basis. This was so because the defendants were the employer of the plaintiff and under the circumstances would be entitled to assess the plaintiff's performance in order to decide whether to continue with its employment for the subsequent years (see para 7). Had it been intended that the continued employment of the plaintiff be subjected to an objective assessment, a reference point would have to be

provided in the agreement by which the plaintiff's performance may be judged to determine its performance to be entitled to be engaged for the subsequent shows (see para 9). The evidence did show that the defendants had considered the performance of the plaintiff subjectively (see para 11). The plaintiff's management performance for the previous shows was in this context quite irrelevant (see para 12).

[Bahasa Malaysia summary

Menurut satu perjanjian bertarikh 7 Januari 1999 ('perjanjian pelantikan'), defendan-defendan pertama dan kedua sebagai penganjur bersama telah melantik plaintif sebagai pengurus pameran Malaysia Furniture Export Exhibition 1999 ('MAFEX '99'). Klausa 3 perjanjian menyatakan bahawa defendan-defendan bersetuju untuk melantik semula plaintif sebagai pengurus pameran untuk tiga pameran seterusnya berdasarkan prestasi memuaskan (plaintif) dalam menguruskan dan mementaskan pemeran tersebut. Setelah berjaya mengurus dan mementaskan MAFEX '99 dan MAFEX 2000, defendan-defendan pertama dan kedua telah menamatkan perjanjian pelantikan itu dan pelantikan plaintif sebagai pengurus pameran untuk MAFEX 2001 dan MAFEX 2002. Dalam tindakan ini, plaintif mendakwa bahawa penamatan itu telah melanggar peruntukan perjanjian pelantikan dan tidak mematuhi prosedur penamatan dalam perjanjian tersebut.

Terdapat dua alasan pembelaan defendan-defendan: (1) prestasi plaintif tidak memuaskan dan oleh itu defendan-defendan berhak untuk tidak melantik semula plaintif untuk tahun-tahun berikutnya 2001 dan 2002; dan (2) tuntutan plaintif dalam apa keadaanpun telah diselesaikan melalui satu penyelesaian antara plaintif dan defendan-defendan.

Diputuskan, menolak tuntutan plaintif:

(1) Perjanjian openyelesaian tidak menyatakan sama ada penyelesaian itu termasuklah satu penyelesaiakn untuk tidak melantik semula plaintif untuk tahun 2001 dan 2002. Oleh itu is tidak boleh dibaca sebagai satu pembelaan terhadap tuntutan plaintif untuk diambil bekerja bagi tahun-tahun berikutnya (lihat perenggan 5).

(2) Klausa 3 perjanjian memberikan defendan-defendan hak untuk menilai prestasi plaintif secara subjektif. Ini adalah kerana defendan-defendan majikan plaintif dan dalam keadaan sedemikian berhak untuk menilai prestasi plaintif bagi tujuan memutuskan sama ada untuk menyambung pekerjaannya untuk tahun-tahun berikutnya (lihat perenggan 7). Jika telah dihasratkan bahawa pekerjaan plaintif diteruskan itu tertakluk kepada penilaian objektif, satu rujukan akan diperuntukkan dalam perjanjian itu yang mana prestasi plaintif boleh diadili untuk menentukan prestasinya untuk melayakkannya diambil bekerja untuk pameran seterusnya (lihat perenggan 9). Keterangan tidak menunjukkan bahawa defendan-defendan telah menimbangkan prestasi plaintif secara subjektif (lihat perenggan 11). Prestasi pengurusan plaintif untuk pameran sebelumnya menunjukkan dalam konteks ini tidak relevan (lihat perenggan 12).]

Notes

For a case on termination, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2376.

S Ashok (TK Wong with him) (TK Wong Tan & Associates) for the plaintiff.
Dr Wong Kim Fatt (CG Tan with him) (Soh Yok Lam & Co) for the first defendant.
Dr Wong Kim Fatt (YS Lee with him) (Jeff Leong Poon & Wong) for the second defendant.

Kang Hwee Gee J:

[1] The plaintiff's claim against the defendants is for damages arising out of a breach of event management contract vide a written agreement signed between the plaintiff as the exhibition manager on the one part and the first defendant and the second defendant on the other as joint organisers.

[2] The first defendant is sued as a society by its office bearers at the time of the alleged breach of contract.

[3] The plaintiff's case may be summarized from the well written submission of the counsel for the plaintiff as follows:

1 Pursuant to an Agreement dated 7 January 1999 ('the Appointment Agreement'), the First and Second Defendants as Joint Organisers appointed the Plaintiff as the Exhibition Manager of the MALAYSIA FURNITURE EXPORT EXHIBITION '99, an exhibition on Malaysian quality household and office furniture products ('MAFEX '99').

5 Upon the successful management and staging of MAFEX '99 and MAFEX 2000, the First and Second Defendants in breach of the provisions of the Appointment Agreement and without complying with the termination procedure referred to in paragraph 3(ii) above, wrongfully terminated the Appointment Agreement and the Plaintiffs appointment as Exhibition Managers for MAFEX 2001 and MAFEX 2002, thus causing loss and damage to the Plaintiff.

PARTICULARS

(i)	Management Fee for MAFEX 2001 and MAFEX 2002 @ R150,000-00 per Exhibition	RM 300,000.00
(ii)	Loss of Commissions for MAFEX 2001 and MAFEX 2002 @ average of RM43 2,687-93 per Exhibition…	RM 865,375.86
	TOTAL	RM1,165,375-86

6 The Plaintiff lias further lost its goodwill and reputation in the business as Exhibition Managers and have further incurred expenses in setting up the infrastructure, administrative and staff requirements in the expectation that they will be the Exhibition Managers up to the year 2002 and the premature termination without just cause and in breach of the terms of the Appointment Agreement has caused further loss and damages to the Plaintiff.

7 The Plaintiff will further contend that the wrongful and premature termination of the Plaintiff by the First and Second Defendants was mala fide and calculated to procure unjust enrichment fur themselves at the expense of the Plaintiff AFTER the Plaintiff had already successfully organised and set up a proper administrative and marketing mechanism for MAFEX '99 and MAFEX 2000 which could conveniently be duplicated, adopted and applied for MAFEX 2001 and MAFEX 2002.

8 The Plaintiff claims:

(a) the sum of RM300,000 being the loss of the management fees;

(b) the sum of RM865,375.86 being the loss of commission;

(c) general damages;

(d) interest at the rate of 8% per annum from the date of the Writ No 25–6 of 2001, to date of full realization;

(e) costs.

[4] The joint defence of the defendants is two-fold:

(1) The plaintiff's performance was unsatisfactory and therefore the defendants are entitled not to reappoint the plaintiff for the subsequent years 2001 and 2002.

(2) The claim of plaintiff in any case had been settled by settlement between the plaintiff and the joint organisers — the first and second defendants.

FINDINGS AND DECISION

[5] The settlement agreement does not say whether the settlement includes a settlement not to reemploy the plaintiff for the year 2001 and 2002. It cannot therefore be read as a defence to the plaintiff's claim to be employed for the subsequent years.

[6] Whether or not the plaintiff succeeds in this action will have to be resolved by die construction of the terms appearing in cl 3 of the agreement which reads as follows:

3 The Joint Organisers agree to re-appoint Protemp as Exhibition Managers for the next 3 succeeding Exhibitions based upon satisfactory performance of Protemp in managing and staging the Exhibition.

[7] The clause in my view confers upon the defendants the right to assess the plaintiff's performance on a subjective basis. This is so because the defendants were the employer of the plaintiff and under die circumstances would be entitled to assess the plaintiff's performance in order to decide whether to continue with its employment for the subsequent years.

[8] In the form that cl 3 is constructed, the defendants were in a sense a consumer. He was the buyer of the plaintiff s service. The clause gave him the mind to decide whether or not to use the plaintiff's service for the subsequent years. The decision was his alone.

[9] Had it been intended that the continued employment of the plaintiff be subjected to an objective assessment, a reference point would have to be provided in the agreement by which the plaintiff's performance may be judged to determine its performance to be entitled to be engaged for the subsequent shows.

[10] The defendants would be committing a breach of the term of this agreement if and only if they decided not to continue to employ the plaintiff for the subsequent years on other grounds other than on their assessment of the plaintiff's performance as for instance by arbitrarily appointing another party as exhibition manager without even considering the performance of the plaintiff.

[11] The evidence did show that the defendants had considered the performance of the plaintiff subjectively. See evidence of DW1 as summarized in paragraph 18 of defendants' written submission as follows:

> 18 DW1 had stated there were numerous complaints against the plaintiff, among them:
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> (18) At the meeting in Classic Hotel, Muar, on 12 March 1999 (exh D2), a few days after MAFEX 1999, Among others PW1., PW2 and DW1 attended this meeting. See attendance sheet, TDD3, and Core Bundle, pp 12–13.
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> (18) Letter dated 15 September 1999 (AB1, p 484 copy annexed hereto), voicing dissatisfaction against the plaintiff.
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> (18) AB1, p 47B, the letter of complaint dated 28 September 1999 (Core Bundle, pp 15–16); from the first defendant on MAFEX 2000. PW1 himself had agreed that this is a letter of complaint (Notes, p 5, Answer No 15).
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> (18) Core Bundle, pp 19–20, at p 20, para 3(d), minutes of meeting on 3 November 1999 concerning pressure on the Plaintiff and the schedule.
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> (18) Core Bundle, p 24, item (1), exh 01, minutes of meeting of 5 November 1999, on dissatisfaction with the attitude of the plaintiff's workers. This meeting was chaired by DW1 and attended by PW2 (for Plaintiff) and PW3 (for the Mines).
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> (18) Core Bundle, p 26, items (1) and (2) below, on deadlines of time tables and the unsold space.

[12] The plaintiff's management performance for the previous shows is in this context quite irrelevant.

[13] With respect to the plaintiffs submission that DW1 and DW2 were incompetent to represent, the defendants as DW1 is now no longer holding the post of president of the first defendant and DW2 is now no longer the employee of the second defendant, I find the submission unsustainable. I accept the submission of counsel for defendants that the defendants are entitled to rely on their counsel to present them in court. The defendants are entitled to call any witnesses to give evidence on their behalf with respect to the events that led to the narrative of this case.

A **[14]** For the foregoing reasons, I dismissed the plaintiffs claim with costs.

Plaintiff's claim dismissed.

Reported by Loo Lai Mee

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